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ANTITRUST LAW

SECTION 8 OF THE CLAYTON ACT APPLICABLE TO CORPORATIONS

SCM Corp. v. FTC

The interlocking directorate is a practice which involves the sharing of common directors by two or more corporations.¹ In an effort to combat the anticompetitive effect of interlocks among competing corporations, Congress, in 1914, enacted section 8 of the Clayton Act² which provides that “[n]o person at the same time

¹ Interlocking directorates have long been thought to foster anticompetitive practices. See REPORT OF THE COMM. ON THE JUDICIARY TO ACCOMPANY H.R. 15657, MAY 6, 1914, H.R. REP. NO. 627, 63d Cong., 2d Sess. § 9, at 19-20 (1914) [hereinafter cited as HOUSE REPORT]; HOUSE COMM. ON BANKING AND CURRENCY, INVESTIGATION OF CONCENTRATION OF CONTROL OF MONEY AND CREDIT, H.R. REP. NO. 1593, 62d Cong., 3d Sess. (1913) [hereinafter cited as PUJO REPORT]; HOUSE COMM. ON BANKING AND CURRENCY, INVESTIGATION OF UNITED STATES STEEL CORP., H.R. REP. NO. 1127, 62d Cong., 2d Sess. (1912) [hereinafter cited as STANLEY REPORT]. Directorates may be linked by various configurations. See notes 36-41 *infra*. The Clayton Act, however, regulates only horizontal interlocks which occur directly between competing corporations. Some commentators have argued that it is only horizontal interlocks that pose a genuine threat to competition. Halverson, *Should Interlocking Director Relationships Be Subject To Regulation And, If So, What Kind?*, 45 ANTITRUST L.J. 341, 347-49 (1976). See also notes 39-40 and accompanying text *infra*. Several studies have documented the widespread existence of interlocks, most of which are not susceptible of enforcement under § 8 of the Clayton Act. See, e.g., STAFF OF THE ANTITRUST SUBCOMM. OF THE HOUSE COMM. ON THE JUDICIARY, 89TH CONG., 1ST SESS., INTERLOCKS IN CORPORATE MANAGEMENT (Comm. Print 1965) [hereinafter cited as INTERLOCKS IN CORPORATE MANAGEMENT]; FEDERAL TRADE COMMISSION, REPORT ON INTERLOCKING DIRECTORATES, H.R. DOC. NO. 652, 81st Cong., 2d Sess. (1951) [hereinafter cited as FTC REPORT]. See also DISCLOSURE OF CORPORATE OWNERSHIP, S. DOC. NO. 93-62, 93d Cong., 2d Sess. (1974).

² Prior to the enactment of the Clayton Act, a series of congressional investigations had highlighted the anticompetitive effects of interlocking directorates in major industries. As early as 1887, Congress investigated the railroad industry, uncovering serious anticompetitive abuses in the areas of construction and repair contracts and leases. These abuses were attributed to a system of interlocking directorates among the parties to the various contracts. PACIFIC RAILWAY COMMISSION, S. EXEC. DOC. NO. 51, 50th Cong., 1st Sess. (1887). In 1912, interlocking directorates in the steel industry were investigated and similar anticompetitive effects were documented. See STANLEY REPORT, *supra* note 1, at 209-10, reprinted in Halverson, *supra* note 1, at 344 n.17.

The problem became a matter of public concern, and by 1912 at least one political party was calling for the enactment of criminal penalties to prevent corporate interlocks. K. PORTER & D. JOHNSON, NATIONAL PARTY PLATFORMS 1840-1956 169 (1956). In a series of articles, Justice Louis Brandeis focused public attention on the “money trust,” a group of powerful and wealthy individuals who controlled large segments of the economy through the device of interlocking directorates. Brandeis, *Breaking the Money Trusts*, HARPERS WEEKLY, Nov. 22, 1913, at 10; *id.*, Nov. 29, 1913, at 9; *id.*, Dec. 6, 1913, at 13; *id.*, Dec. 13, 1913, at 10; *id.*, Dec. 20, 1913, at 10; *id.*, Dec. 27, 1913, at 18; *id.*, Jan. 3, 1914, at 11; *id.*, Jan. 10, 1914, at 18; *id.*, Jan. 17, 1914, at 18. Justice Brandeis concluded that interlocks were “the most potent instrument of the money trust.” *Id.*, Dec. 6, 1913, at 13.

shall be a director in any two or more [competing] corporations" if the elimination of competition between them would violate any of the antitrust laws.³ Although the statute appears to require compliance by the individual director only, in *SCM Corp. v. FTC*,⁴ a case of first impression, a unanimous Second Circuit panel held that the statute imposes an affirmative duty on corporations as well.⁵

From 1967 to 1975, Richard C. Bond had been a member of the board of directors of both SCM Corporation and Kraftco Corporation, competitors within the packaged food industry.⁶ Alleging a

In response to a growing public concern, President Woodrow Wilson, in his 1914 message to Congress, requested a law which would

effectually prohibit and prevent . . . interlockings of the *personnel* of the directorates of great corporations . . . as in effect result in making those who borrow and those who lend practically one and the same, those who sell and those who buy but the same persons trading with one another under different names and in different combinations, and those who affect to compete in fact partners and masters of some whole field of business.

HOUSE REPORT, *supra* note 1, at 18, reprinted in Halverson, *Interlocking Directorates—Present Antitrust Enforcement Interest Placed in Proper Analytical Perspective*, 21 VILL. L. REV. 393, 398 (1975) (emphasis in original). President Wilson's request was subsequently incorporated in two bills which were ultimately enacted with some modifications. See 51 CONG. REC. 2142 (1914); note 34 *infra*.

³ 15 U.S.C. § 19 (1976). Following an early period of public interest in interlocks, see note 2 *supra*, there was a lull in enforcement activity until 1947, when the Department of Justice announced the results of a survey concerning interlocks and indicated that it would seek voluntary resignations of offenders. See Kramer, *Interlocking Directorships And The Clayton Act After 35 Years*, 59 YALE L.J. 1266, 1270-71 (1950). The technique of securing voluntary compliance, known as "jawboning," proved largely successful. Section 8, however, has been the subject of very little litigation. In fact, from 1914 to 1965, the Department of Justice instituted only 10 suits to enforce § 8. INTERLOCKS IN CORPORATE MANAGEMENT, *supra* note 1, at 227. In addition, 13 § 8 complaints were filed by the FTC during this period, although 12 of these were dismissed when the offending director resigned. *Id.* The first major attempt to enforce § 8 in the courts was in 1952 when the Department of Justice instituted four suits under the statute. *United States v. W.T. Grant Co.*, 112 F. Supp. 336 (S.D.N.Y.), *aff'd on other grounds*, 345 U.S. 629 (1953) (three cases consolidated); *United States v. Sears, Roebuck & Co.*, 111 F. Supp. 614 (S.D.N.Y. 1953); see Travers, *Interlocks in Corporate Management And The Antitrust Laws*, 46 TEX. L. REV. 819, 820, 821 n.8 (1968).

In recent years there has been a shift away from voluntary compliance toward formal settlements directed at corporate as well as individual conduct. See, e.g., *In re General Elec. Co.*, [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,436 (1973). Since 1972, corporations generally have been required to accept formal consent agreements, even when the interlock was terminated voluntarily. *In re Kraftco Corp.*, 89 F.T.C. 46, 53 & n.20 (1977). Additionally, the FTC has been imposing reporting requirements on corporations as a means of further broadening their responsibility to avoid participation in anticompetitive interlocks. *Id.*; see *In re Aluminum Co. of America*, 82 F.T.C. 1819 (1973); *In re Aluminum Co. of America*, 82 F.T.C. 1814 (1973).

⁴ 565 F.2d 807 (2d Cir.), *vacating and remanding* 89 F.T.C. 46 (1977).

⁵ 565 F.2d at 811.

⁶ *Id.* at 809. Both corporations sold margarine, barbecue sauce and edible oils. In 1975, SCM sold \$83 million worth of these items in the competitive market, while Kraftco's sales were approximately \$258 million. *Id.*

violation of section 8, the FTC filed a complaint against Bond, Kraftco and SCM.⁷ Shortly thereafter, Bond resigned from the board of directors of SCM, and both Bond and Kraftco consented to the entry of a cease and desist order.⁸ SCM, however, answered the FTC's complaint by arguing that section 8 was not applicable to corporations.⁹ Rejecting this contention, the Administrative Law Judge determined that SCM had violated section 8 and that a cease and desist order was justified.¹⁰ The FTC affirmed on appeal,¹¹ and SCM filed a petition for review in the Second Circuit.¹²

Judge Feinberg¹³ began his analysis by observing that, since the statute's application to corporations was not clear from its face,¹⁴ it was necessary to address the policy considerations underlying its enactment.¹⁵ The court noted that section 8 was "prophylactic" and was designed "to nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates."¹⁶ Therefore, the narrow con-

⁷ *Id.*

⁸ *Id.* When the FTC discovers an alleged violation of § 8, it may proceed in one of two ways. Where time and the public interest permit, the FTC may afford an alleged offender an opportunity to submit a proposed consent settlement for consideration by the Commission. 16 C.F.R. § 2.31(a) (1978). A consent order issued pursuant to an accepted proposed settlement has the same force and effect as a cease and desist order. *Id.* § 2.32. Alternatively, the FTC may proceed with a formal complaint. *Id.* §§ 3.1-.72. Effective Aug. 22, 1977, the FTC abolished its voluntary compliance procedure whereby it could accept promises of alleged offenders to discontinue the questioned practices. *FTC News Release of September 13, 1977. See also* 42 Fed. Reg. 42195 (1977).

⁹ 565 F.2d at 809.

¹⁰ *Id.*

¹¹ 89 F.T.C. 46, 60 (1977).

¹² 565 F.2d at 809. Appeals from final determinations of the FTC are taken directly to the court of appeals. The appellant may seek review in either the circuit within which the violation occurred or the circuit within which the appellant resides or carries on business. 15 U.S.C. § 21(c) (1976).

¹³ Circuit Judges Moore and Mulligan joined in the opinion.

¹⁴ 565 F.2d at 811. The court also noted a dearth of prior authority on the question and remarked that the absence of reported decisions under § 8 might have been the result of the government's past reliance on administrative measures to enforce the statute. *Id.* at 810; *see* note 3 and accompanying text *supra*. In *United States v. W.T. Grant Co.*, 345 U.S. 629, 634 n.9 (1953), the issue of § 8's scope was expressly left open by the Supreme Court. In *United States v. Sears, Roebuck & Co.*, [1952-1953] *TRADE CAS. (CCH)* ¶ 67,561 (S.D.N.Y. 1953), however, District Judge Weinfeld held that § 8 is broad enough to reach the corporation as well as the individual director. Judge Weinfeld reasoned that "[t]he violation . . . [is] committed by the individual defendant in accepting membership on the Boards of Directors of both corporations and by [the corporate defendant] in acquiescing therein over an extended period of years." *Id.* at 68,668.

¹⁵ 565 F.2d at 810-11.

¹⁶ *Id.* at 811 (quoting *United States v. Sears, Roebuck & Co.*, 111 F. Supp. 614, 616 (S.D.N.Y. 1953)); *see In re Penn Cent. Sec. Litigation*, 367 F. Supp. 1158, 1168 (E.D. Pa. 1973); S. REP. NO. 698, 63d Cong., 2d Sess. (1914), *quoted in* LEGISLATIVE REFERENCE SERVICE

struction of section 8 proposed by SCM would undermine this policy, since the unpunished corporation could maintain the interlock indefinitely by replacing each ousted board member with another interlocking director.¹⁷

In addition to the policy considerations supporting a broad reading of section 8, the *SCM* court took note of the relationship between section 8 and section 11(b) of the Clayton Act, which provides that, upon determining that any person has violated section 8, the FTC "shall issue . . . an order requiring such person to . . . rid itself of the directors chosen contrary to the provisions . . . of [this Act]."¹⁸ This language, the court observed, indicated that section 8 was intended to reach corporations, since only a corporation can "rid itself" of a director.¹⁹

Turning his attention to the legislative history of section 8, Judge Feinberg suggested that language in the House Report indicated that the drafters intended the paragraph in section 8 dealing with industrial corporations²⁰ to impose restraints upon corporations as well as directors.²¹ In addition, the court determined that Con-

OF THE LIBRARY OF CONGRESS, CONGRESS AND THE MONOPOLY PROBLEM: FIFTY-SIX YEARS OF ANTITRUST DEVELOPMENT, 1900-1956 60 (1968) [hereinafter cited as CONGRESS AND THE MONOPOLY PROBLEM].

¹⁷ 565 F.2d at 810 (quoting 89 F.T.C. 46, 63 (1977)).

¹⁸ 15 U.S.C. § 21(b) (1976).

¹⁹ 565 F.2d at 811. Judge Feinberg rejected SCM's contention that § 11(b) was merely procedural and that the "rid itself" language was only a "vestigial remainder" of the original version of § 8, which expressly prohibited banking corporations from having interlocked directorates. *Id.*; see Clayton Act, ch. 323, § 8, 38 Stat. 730 (1914). This express prohibition was eliminated in 1935. Act of Aug. 23, 1935, Pub. L. No. 74-305, ch. 614, § 329, 49 Stat. 717.

The court's position is supported by basic tenets of construction which suggest that parts of a statute should be construed consistently, see *Clark v. Uebersee Finanz-Korp.*, 332 U.S. 480, 488-89 (1947), and that, where possible, no part should be denied effect, *Ex Parte Public Nat'l Bank*, 278 U.S. 101, 104 (1928). The "rid itself" language in § 11(b), however, could be regarded as merely one of several tools available to the FTC to remedy a violation of § 8. At least one commentator has advanced a similar view, arguing that § 11(b) only provides an enforcement tool and does not add any substantive liabilities. See Wilson, *Unlocking Interlocks: The On-Again Off-Again Saga of Section 8 of the Clayton Act*, 45 ANTITRUST L.J. 317, 322 (1976).

²⁰ Although the statute itself does not mention industrial corporations, the House Report states that the paragraph in question "deals with the eligibility of directors in industrial corporations engaged in commerce." HOUSE REPORT, *supra* note 1, at 19.

²¹ 565 F.2d at 811. The court quoted from that part of the House Report which described the corporations to which § 8 was to apply: "This section is divided into three paragraphs, each of which relates to the particular class of corporations described, and the provisions of each paragraph are limited in their application to the corporations belonging to the class named therein." 565 F.2d at 811 (quoting HOUSE REPORT, *supra* note 1, at 18) (emphasis added by court). Stressing the "application to corporations" language, Judge Feinberg appears to have misinterpreted the passage that merely directs that the provisions referring to industrial corporations govern interlocks among industrial corporations and no others.

gress intended the scope of the paragraph relating to industrial corporations to be coextensive with that of a subsequently repealed paragraph which explicitly prohibited banking corporations from having interlocked directorates.²² Thus, although the paragraph relating to industrial corporations did not precisely state that corporations were included, an intent to include them could be inferred.²³ While concluding that the FTC's interpretation of section 8 was correct, the court found that the FTC may have applied the wrong standard governing burden of proof in entering its cease and desist order against SCM,²⁴ and, therefore, remanded the case with instructions to reconsider in light of the proper standard.²⁵

²² 565 F.2d at 811. The court quoted the following language from the House Report: In this, as in the preceding paragraph relating to banks, it was not deemed necessary or advisable that interlocking directorates should be prohibited between the smaller industrial corporations . . . The concentration of wealth, money, and property in the United States under the control and in the hands of a few individuals or great corporations has grown to such an extent . . .

Id. (quoting HOUSE REPORT, *supra* note 1, at 19) (emphasis added by court).

²³ 565 F.2d at 811.

²⁴ In its decision to issue an injunction against SCM despite the resignation of the board member in question, the FTC stated that "the violation is itself the best evidence of the possibility of future such occurrences, and that the burden rests with respondent to demonstrate that violations will not recur before consideration may be given to omitting an order." *In re Kraftco Corp.*, 89 F.T.C. 46, 66 (1977) (citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)). The Second Circuit, however, concluded that the FTC had confused the issue of mootness with the question of the propriety of issuing an injunction. It is true that, where the offending director has resigned, the § 8 action may be mooted if the *defendant* bears the burden of showing that there is no possibility of recurrence. 565 F.2d at 812; *see United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). Even if the defendant cannot meet this heavy burden, however, an injunction may not be granted unless the party seeking relief demonstrates that "there exists some cognizable danger of recurrent violation." *Id.* While recognizing that the distinction was a subtle one, Judge Feinberg nevertheless stated that the differences in the distribution of the burden of proof should not be entirely obliterated. 565 F.2d at 812.

At least one commentator has noted that the proof necessary to establish "a cognizable danger of recurrent violation" remains uncertain. Travers, *supra* note 3, at 822; *see, e.g., United States v. W.T. Grant Co.*, 345 U.S. 629, 635-36 (1953); *United States v. Newmont Mining Co.*, 34 F.R.D. 504, 507 (S.D.N.Y. 1964).

²⁵ 565 F.2d at 813. As an alternate ground for reversal, SCM argued that it had been unlawfully discriminated against because the FTC's complaint of June, 1975 had been issued under a formal procedure, although the FTC previously had enforced § 8 through informal measures. *See* note 8 *supra*. The court, however, refused to adopt the view that discrimination existed merely because SCM was one of the first to be subjected to the new formal complaint procedure. *Id.* at 814. Indeed, the FTC is not even obliged "to start simultaneous suits against all alleged offenders." *Ger-Ro-Mar, Inc. v. FTC*, 518 F.2d 33, 35 (2d Cir. 1975). *See also FTC v. Universal-Rundle Corp.*, 387 U.S. 244, 251-52 (1967); *Moog Indus., Inc. v. FTC*, 355 U.S. 411, 413 (1958).

SCM also contended that the substantial differences between the consent decree entered into by Kraftco and the cease and desist order entered against it violated the constitutional guarantee of due process. 565 F.2d at 814. The court found it unnecessary to reach the question whether an unexplained difference would pose due process problems, since it found

Clearly, corporations with interlocking boards could use their common directors to influence business policy and restrain competitive activity.²⁶ Anticompetitive effects are particularly likely to emerge when a common director is required to vote on a business policy which is necessary or favorable to one of the competitors but inimical to the interests of the other. Section 8, which has been held to establish a *per se* rule of law,²⁷ was intended to prevent such effects²⁸ by automatically proscribing certain interlocks, whether or not they actually are proved harmful to competition. In holding that corporations are punishable under section 8, the Second Circuit has enlarged the scope of the statute in an apparent effort to strengthen the impact of the section and promote its enforcement. In this respect, the *SCM* decision is consistent with the general purpose of the Clayton Act to alleviate potential threats to competition by "[arresting] the creation of trusts . . . in their incipency."²⁹

There is a surprising inconsistency, however, between the apparently broad deterrent purpose of the statute and the actual limitations inherent in its language. The plain wording of section 8 seems to restrict its prohibition to those "persons"—natural or cor-

the disparity between the Kraftco settlement and the *SCM* order neither "arbitrary [n]or irrational in light of the facts before the FTC." *Id.* The court also noted that the FTC has broad discretion in fashioning remedies for anticompetitive practices. *Id.* at 814; see *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965); *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 392 (1959); *FTC v. Cement Inst.*, 333 U.S. 683, 726 (1948); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611 (1946); *Fedders Corp. v. FTC*, 529 F.2d 1398, 1401-02 (2d Cir.), *cert. denied*, 429 U.S. 818 (1976). Moreover, the Supreme Court has held that, as long as an order is reasonably related to the proscribed practices, it should be upheld. *FTC v. National Lead Co.*, 352 U.S. 419, 428 (1957); *Hoving Corp. v. FTC*, 290 F.2d 803 (2d Cir. 1961). For the criteria used in determining whether an administrative procedure violates due process, see *Blackledge v. Perry*, 417 U.S. 21, 27 (1974); *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969).

²⁴ It has been argued that no hard evidence of actual trade restraints has emerged as a result of governmental investigations of interlocking directorates. Halverson, *supra* note 2, at 394 & n.4; Wilson, *supra* note 19, at 329. While theories of adverse anticompetitive effect have been advanced, see, e.g., FTC REPORT, *supra* note 1, at 23; Halverson, *supra* note 2, at 400 n.33, adverse economic impact has not been demonstrated. One commentator has even suggested that the benefits of certain interlocking directorates may outweigh any potential abuses. Wilson, *supra* note 19, at 329. But see notes 39-40 *infra*.

²⁵ *United States v. Sears, Roebuck & Co.*, 111 F. Supp. 614, 616 (S.D.N.Y. 1953). The *Sears* defendant contended that it could be held liable for a violation of § 8 only if a merger between the interlocked corporations would violate § 7 of the Clayton Act, 15 U.S.C. § 18 (1976). 111 F. Supp. at 616. The court, however, declined to accept this position, holding instead that if any hypothetical agreement would violate any of the antitrust laws, the interlock is prohibited. *Id.* at 621.

²⁶ See, e.g., *In re Penn Cent. Sec. Litigation*, 367 F. Supp. 1158, 1168 (E.D. Pa. 1973).

²⁷ CONGRESS AND THE MONOPOLY PROBLEM, *supra* note 16, at 60 (quoting S. REP. NO. 698, 63d Cong., 2d Sess. 1 (1914)). The Clayton Act was enacted to strengthen the Sherman Act. *United States v. Sears, Roebuck & Co.*, 111 F. Supp. 614, 616 (S.D.N.Y. 1953); S. REP. NO. 698, 63d Cong., 2d Sess. (1914).

porate—who serve on the boards of competing corporations.³⁰ While the *SCM* court's construction of section 8 in light of the language in section 11(b) is plausible, it is submitted that a closer examination of the statute's legislative, political and economic history would yield a different result.³¹

A major premise of the proponents of anti-interlock legislation was that no one person could effectively manage the affairs of more than one large corporation.³² In fact, among the stated objectives underlying the enactment of section 8 were inducing corporate directors to concentrate their responsibilities and avoid positions of conflicting interest, and creating the opportunity for others to rise to high level management positions.³³ This legislative focus on the activities of directors, it is submitted, is entirely consistent with a narrow construction of section 8.

Moreover, contrary to the view taken by the *SCM* court, it does not appear that section 8 was intended as an all-encompassing solution to the problem of corporate interlocks. The final measure which

³⁰ 15 U.S.C. § 19 (1976). Under the "deputization" theory, a corporation theoretically could violate § 8 if it placed officers on the boards of competing corporations with the intention that the officers act as corporate agents. This theory, however, has not yet been addressed directly by the courts. See *United States v. Cleveland Trust Co.*, 392 F. Supp. 699, 711-12 (N.D. Ohio 1974), *aff'd without opinion*, 513 F.2d 633 (6th Cir. 1975), *consent decree entered*, [1975-2] TRADE CAS. (CCH) ¶ 60,611 (N.D. Ohio 1975); Halverson, *supra* note 2, at 403-04; Wilson, *supra* note 19, at 323.

³¹ When statutory language is ambiguous, resort to legislative history is justified. *United States v. Public Util. Comm'n*, 345 U.S. 295, 315 (1953); see *United States v. Zacks*, 375 U.S. 59, 62 (1963); *Flora v. United States*, 362 U.S. 145, 151 (1958); *Schwartz v. Romnes*, 495 F.2d 844, 849 (2d Cir. 1974). See also *Natural Resources Defense Council, Inc. v. Train*, 545 F.2d 320, 325 (2d Cir. 1976). Political and economic background is particularly helpful in the construction of remedial measures such as the antitrust laws. 2 J. VON KALINOWSKI, *ANTITRUST LAWS AND TRADE REGULATION* § 10.01 (1978) (citing *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 318-19 (1897)); see *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1952); *Eck v. United Arab Airlines, Inc.*, 360 F.2d 804, 812 (2d Cir. 1966); *United States v. Ninety-Nine Diamonds*, 139 F. 961, 965 (8th Cir. 1905); E. CRAWFORD, *CONSTRUCTION OF STATUTES* 247-48 (1940).

³² See *BRANDEIS, OTHER PEOPLE'S MONEY* ch. X, at 201-02 (1914); Douglas, *Directors Who Do Not Direct*, 47 HARV. L. REV. 1305 (1934); Kramer, *supra* note 3, at 1275.

³³ Kramer, *supra* note 3, at 1270. In his 1914 message to Congress, President Wilson stated that a ban on interlocks would "bring new men, new energies, a new spirit of initiative, new blood, into the management of our great business enterprises." HOUSE REPORT, *supra* note 1, at 18 (quoting President Wilson's January 20, 1914 message to Congress). This theme was also adopted by the drafters of the bill, who stated:

[T]he adoption of the provisions of this section will bring new men, new energies, new spirit of initiative, and new blood into the management of our business enterprises. It will open the field of industrial development and origination to scores of men who have been obliged to serve when their abilities entitled them to direct. It will immensely hearten the young men coming on and will greatly enrich the business activities of the whole country.

HOUSE REPORT, *supra* note 1, at 20.

emerged from the legislative process was a considerably diluted version of the strong bill supported by proponents of vigorous antitrust enforcement.³⁴ Interlocks were prohibited only in three specific industries,³⁵ and some forms of interlocks were left entirely unregulated.³⁶ Despite subsequent attempts to amend the statute, section 8 remains riddled with loopholes.³⁷ For example, since section 8 proscribes interlocks only when competing corporations share common directors, interlocks may be effected lawfully through stockholders, officers or other employees of the corporation.³⁸ Section 8

³⁴ The original Clayton bill, H.R. 15657, 63d Cong., 2d Sess. (1914), was referred to the House Judiciary Committee, which amended § 8 to cover only those corporations with \$1,000,000 in capital, surplus or undivided profits. See HOUSE REPORT, *supra* note 1. The Senate Judiciary Committee rejected the provisions containing criminal sanctions for violations of § 8, preferring instead to rely on FTC enforcement. See S. REP. NO. 698, 63d Cong., 2d Sess. (1914). The criminal sanctions were not revived in legislative conference. See S. DOC. NO. 586, 63d Cong., 2d Sess. (1914). The bill finally was signed into law by President Wilson along with the Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (1976), on October 15, 1914. 2 J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 10.03 [2] (1978). Senator Reed, a supporter of a strong bill, characterized the final product as follows: "When the Clayton Bill was first written, it was a raging lion with a mouth full of teeth. It has degenerated to a tabby cat with soft gums, a plaintive meow and an anemic appearance." 61 CONG. REC. 15,819 (1914).

³⁵ The only three categories of corporations affected by the Clayton Act's provisions on interlocks were common carriers under § 10, 15 U.S.C. § 20 (1976), banking institutions under § 8, *id.* § 19, and industrial corporations under § 8, *id.*

³⁶ See Wilson, *supra* note 19, at 319-20; notes 38-40 *infra*.

³⁷ See Halverson, *supra* note 2, at 398-99 & n.25; Kramer, *supra* note 3, at 1271-74; Travers, *supra* note 3, at 822-24; Wilson, *supra* note 19, at 326. See generally *Hearings on Corporate Disclosure Before the Subcomm. on Budgeting, Management, and Expenditures and the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations*, 93d Cong., 2d Sess., pt. 2, at 897-912 (1974) [hereinafter cited as *Hearings on Corporate Disclosure*]; *Hearings Before the Subcomm. on the Study of Monopoly Power of the House Comm. on the Judiciary*, 82d Cong., 1st Sess., ser. 1, pt. 2, at 21, 26-46 (1951) [hereinafter cited as *Hearings on Monopoly Power*]; Panel Discussion, *Unlocking Interlocks: The On-Again Off-Again Saga of Section 8 of the Clayton Act*, 45 ANTITRUST L.J. 315, 315-54 (1976). There has been disagreement among the commentators concerning the need to enact remedial legislation to supplement § 8. See Halverson, *supra* note 2, at 409 (current legislation is broad enough to permit regulation of interlocks not proscribed by § 8 when facts of particular case so require); Kramer, *supra* note 3, at 1274-75 (additional legislation should be seriously considered to remedy defects in § 8); Travers, *supra* note 3, at 863-64 (legislation is required to close some loopholes while others should be left as is).

³⁸ The operation of this "loophole" is aptly illustrated by the testimony of former FTC Chairman Mead before the House Subcommittee on the Study of Monopoly Power:

[S]everal years ago the board of directors of General Steel Castings contained the president and two vice-presidents of American Steel Foundries, all of whom were also directors of the latter company and also contained the chairman of the board and the president of Baldwin Locomotive, both of whom were also directors of that company. When the Department of Justice questioned these interlocking directors, the directors from American Steel Foundries and Baldwin withdrew from the General Steel Castings board. There is a catch. Their place was taken by two vice-presidents of Baldwin Locomotive, but since none of these officials was a director

also fails to address vertical³⁹ and indirect interlocks,⁴⁰ as well as the interlocking of potential competitors.⁴¹ Thus, since section 8 was drafted to regulate only a limited class of interlocks,⁴² it is not unrealistic to assume that Congress meant to similarly limit the class of persons against whom the statute was to be enforced.⁴³

The view that section 8 was intended as a limited, piecemeal reform measure, rather than a sweeping prohibition on corporate interlocks, is also supported by recent legislative developments.

in any of these companies but General Steel Castings, the new arrangement satisfied the requirements of Section 8 of the Clayton Act. There is no reason to believe that the closeness of the executive and policymaking ties between the three companies was in any way reduced by the change.

Hearings on Monopoly Power, *supra* note 37, at 28.

³⁹ Vertical interlocks occur when companies in a vertical market relationship such as manufacturer-customer, supplier-customer, or creditor institution-credit customer, are linked by a common director. Turner, *Interlocks—A Legislative View*, 45 ANTITRUST L.J. 331, 335 (1976). See generally Travers, *supra* note 3, at 851-61.

Vertical interlocks are quite prevalent today. See FTC REPORT, *supra* note 1. See generally INTERLOCKS IN CORPORATE MANAGEMENT, *supra* note 1. Moreover, studies reveal that such interlocks may be vehicles for potentially serious anticompetitive practices. See SUBCOMM. ON REPORTS, ACCOUNTING AND MANAGEMENT, SENATE COMM. ON GOVERNMENT OPERATIONS, CORPORATE OWNERSHIP AND CONTROL, S. Doc. No. 94-246, 94th Cong., 2d Sess. (1976) [hereinafter cited as METCALF SUBCOMM.]; FTC REPORT, *supra* note 1, at 23. Various observers who have assessed the significance of vertical interlocks disagree on what, if anything, should be done to curtail them. See, e.g., Halverson, *supra* note 2, at 406 (vertical interlocks causing "identifiable anticompetitive effects" must be dissolved); Kessler & Stern, *Competition, Contract, and Vertical Integration*, 69 YALE L.J. 1, 24-26 (1959) (vertical interlocks are not injurious to competition and should not be proscribed); Travers, *supra* note 3, at 864 (outright ban on vertical interlocks is too severe, but competitive bidding might be required in certain situations).

⁴⁰ Indirect interlocks occur where two or more competing or potentially competitive companies which do not share common directors are linked through a third entity. For example, competing companies may have directors or other employees acting as directors in a third company. Alternatively, a lending institution may have directors on the boards of several competing companies. Turner, *supra* note 39, at 335. Such indirect interlocks are also widespread. It has been observed that interlocking relationships among manufacturers and financial institutions constitute the most significant network of indirect interlocks. FTC REPORT, *supra* note 1, at 27.

As in the case of vertical interlocks, observers differ on the question whether additional legislation is required to limit indirect interlocks. See, e.g., Halverson, *supra* note 1, at 349; Travers, *supra* note 3, at 863-64.

⁴¹ Travers, *supra* note 3, at 823.

⁴² See HOUSE REPORT, *supra* note 1; notes 35-41 and accompanying text *supra*.

⁴³ Contrary to the conclusion of the SCM court, see notes 20-23 and accompanying text *supra*, there is nothing in the legislative history to indicate that Congress intended the specific prohibition on interlocks among banking corporations, see note 19 *supra*, to apply to industrial corporations. The passage from the House Report relied on by the court, see note 22 *supra*, demonstrates only that the provision limiting § 8's reach to larger enterprises was intended to apply to industrial corporations as well as banking corporations. Nothing in the quoted language suggests that the statutory proscriptions regarding the conduct of industrial corporation directors was intended to extend to the corporations themselves.

Cognizant of the limitations inherent in section 8,⁴⁴ several legislators have made unsuccessful efforts to broaden the coverage of the statute.⁴⁵ At least one bill would have expressly included corporations within the scope of section 8.⁴⁶ Thus, it appears that Congress was aware of the interlock threat in 1914, chose to deal with the problem in a restrictive and selective manner then, is still aware of the potential anticompetitive effect of interlocks, and has continued to demonstrate its intent to restrict enforcement to certain specified areas.

Such a conclusion, however, does not suggest that the government is precluded from seeking relief against an offending corporation.⁴⁷ Section 5 of the Federal Trade Commission Act (FTCA)⁴⁸ empowers the FTC to reach corporations when they participate in interlocks that are inimical to the spirit as well as the letter of the antitrust laws,⁴⁹ even if the offense could not have been reached under section 8.⁵⁰ In addition, the government can reach interlocks

⁴⁴ See, e.g., METCALF SUBCOMM., *supra* note 39; *Hearings on Corporate Disclosure*, *supra* note 37, pt. 3, at 168-75; INTERLOCKS IN CORPORATE MANAGEMENT, *supra* note 1; *Hearings on Monopoly Power*, *supra* note 37, at 26-46.

⁴⁵ See, e.g., H.R. 4406, 94th Cong., 1st Sess. (1975); H.R. 14997, 93d Cong., 2d Sess. (1974); H.R. 13581, 93d Cong., 2d Sess. (1974); H.R. 2346, 91st Cong., 1st Sess. (1971); H.R. 2509, 90th Cong., 1st Sess. (1965). None of these bills was reported out of committee.

⁴⁶ H.R. 11110, 94th Cong., 1st Sess. § 8(2)(2) (1975), *reprinted in* Halverson, *supra* note 1, at 341 n.1. According to the office of Congresswoman Chisholm, a co-sponsor of the bill, no action was taken on H.R. 11110 and the bill died in committee. Telephone conversation with Mrs. Doren, New York Office of Congresswoman Chisholm, October 31, 1978.

⁴⁷ At least one court has stated that regardless of whether § 8 applies to corporations, if the court deemed injunctive relief necessary to prevent future violations of the statute, it could enjoin the corporations as well as the individual directors pursuant to 15 U.S.C. § 25 (1976). *United States v. Crocker Nat'l Corp.*, 422 F. Supp. 686, 705-06 (N.D. Cal. 1976), *appeal docketed*, No. 76-3614 (9th Cir. Dec. 10, 1976).

⁴⁸ 15 U.S.C. § 45(a) (1976) provides, in pertinent part:

(1) Unfair methods of competition in . . . commerce, and unfair or deceptive acts or practices in . . . commerce, are declared unlawful.

(6) The Commission is empowered and directed to prevent persons, partnerships or corporations . . . , from using unfair methods of competition in . . . commerce and unfair or deceptive acts or practices in . . . commerce.

⁴⁹ *FTC v. Sperry Hutchinson Co.*, 405 U.S. 233, 239-44 (1972); *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966); *FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392 (1953); 6 J. VON KALINOWSKI, *ANTITRUST LAWS AND TRADE REGULATION* § 39.05[5] (1978); Halverson, *supra* note 2, at 404. In *Grand Union Co. v. FTC*, 300 F.2d 92 (2d Cir. 1962), the court held that, although the applicable provision of the Clayton Act, as amended by the Robinson-Patman Price Discrimination Act, 15 U.S.C. § 13(d) (1976), does not cover illegal conduct by a buyer, the buyer may be reached under § 5 of the FTCA. 300 F.2d at 99. In general, the courts have given the FTC great latitude to protect competition under § 5 of the FTCA.

⁵⁰ *FTC v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966); see *FTC v. Sperry Hutchinson Co.*, 405 U.S. 233 (1972); *Atlantic Refining Co. v. FTC*, 381 U.S. 357 (1965); *FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392 (1953); *FTC v. Cement Inst.*, 333 U.S. 683 (1948); *Fashion*

which are part of a conspiracy to restrain or monopolize trade through the provisions of the Sherman Act.⁵¹

In conclusion, the Second Circuit's holding in *SCM* strengthens the Clayton Act by placing an affirmative duty on corporations to avoid interlocks proscribed by section 8. The legislative history, however, suggests that section 8 was a narrowly drawn statute designed to place the burden of compliance on the individual director rather than the corporation.⁵² It therefore appears that, in stressing the remedial and prophylactic purposes of the statute, the *SCM* court has expanded the scope of section 8 beyond its permissible boundaries. Admittedly, the tension between the preventive purpose⁵³ of the statute and the practices and parties⁵⁴ left unregulated by its terms is difficult to reconcile. Much of this tension, however, is eliminated when section 8 of the Clayton Act is considered in conjunction with section 5 of the FTCA, which provides an alternative vehicle for penalizing conduct that is injurious to the competitive market system.⁵⁵ It is submitted that, in the face of Congress' continuing refusal to amend section 8 to broaden its scope, section 5 of the FTCA must be regarded as the exclusive statutory authority for enforcing the government's anti-interlock policy against corporations.

Maralynne Flehner

Originators Guild of America v. FTC, 312 U.S. 457 (1941); FTC v. R.F. Keppel & Bro., 291 U.S. 304 (1934); Halverson, *supra* note 1, at 349; Halverson, *supra* note 2, at 404.

It has been suggested that supporters of a strong anti-interlock bill agreed to the weaker version of § 8, *see* note 34 *supra*, because they believed that interlocks not covered by the statute could be reached under § 5 of the FTCA as unfair methods of competition. Travers, *supra* note 3, at 831-32. Professor Travers argues that President Wilson initially favored a strong, specifically defined Clayton Act and a weak regulatory commission, but later redirected his efforts toward establishing a strong regulatory commission. *Id.* at 831. Professor Travers also notes: "It is . . . clear that Congress did not want to include any other interlocks under the rigid prohibition of section 8; it is not clear, however, that Congress deliberately refused to change section 8 because it wished to exclude all other interlocks from antitrust coverage." *Id.* at 832 (footnote omitted). This view is supported by S. REP. NO. 597, 63d Cong., 2d Sess. 13 (1914), which states: "The Committee was of the opinion that it would be better to put in a general provision condemning unfair competition than to attempt to define the numerous unfair practices, such as local price cutting, interlocking directorates, and holding companies intended to restrain substantial competition." *See generally* Oppenheim, *Guides to Harmonizing Section 5 of the Federal Trade Commission Act with the Sherman and Clayton Acts*, 59 MICH. L. REV. 821 (1961); Pearson, *Section 5 of the Federal Trade Commission Act as Antitrust: A Comment*, 47 B.U.L. REV. 1 (1967).

⁵¹ 15 U.S.C. §§ 1-2 (1976); *see* Kramer, *supra* note 3, at 1272 n.26; Travers, *supra* note 3, at 821 & n.10.

⁵² *See* notes 32-43 and accompanying text *supra*.

⁵³ *See* notes 28-29 and accompanying text *supra*.

⁵⁴ *See* notes 35-43 and accompanying text *supra*.

⁵⁵ *See* notes 48-50 and accompanying text *supra*.